Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Petition of Qwest Corporation for Forbearance	**)**	**Docket No. 04-416**
Pursuant to 47 U.S.C. § 160(c) Pertaining	**)**	
To Qwest's DSL Service	**)**	

<u>OPPOSITION OF COMPTEL/ASCENT</u>

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SUMMARY

The Commission should deny Qwest's Petition For Forbearance from dominant carrier tariff regulation for its sale of mass market DSL services to end users in its 14 state service area. Qwest failed to present evidence that it is nondominant in the provision of broadband service to residential and business customers in each of the local service areas in each of its 14 states. Indeed, it failed to even properly identify the relevant product and geographic markets necessary to evaluate market power.

Qwest wants to be relieved of the rate averaging and other tariff requirements so that it can engage in strategic pricing by charging lower prices to customers who have a choice of broadband providers and higher prices to those customers who have no alternative but Qwest. Such pricing behavior is discriminatory and reflects not a difference in costs, but the presence or absence of competitors. Since Qwest did not show that all mass market business and residential customers in its local service areas have a choice of providers, granting forbearance would allow Qwest to charge unreasonable and discriminatory prices, would harm consumers and would disserve the public interest. The Commission must deny Qwest's Petition for failing to satisfy the three prongs of Section 10(a) of the Communications Act.

The Commission should also deny Qwest's request for forbearance from enforcing the avoided cost discount resale provisions of Sections 251(c) and 271 for DSL service. Contrary to Qwest's complaints, Qwest does not need forbearance in order to engage in commercial negotiations for resale terms and conditions with its CLEC competitors. Qwest already has that freedom pursuant to Section 252(a) of the Act. The statutory resale provisions provide a necessary default pricing option in the event that

Qwest is unable to reach voluntary agreements with CLECs. As long as Qwest and the other ILECs continue to dominate the ADSL market, eliminating the Sections 251(c) and 271 resale obligations will not enhance competition nor promote competitive market conditions.

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CompTel/ASCENT hereby submits its opposition to Qwest Corporation's ("Qwest") Petition for Forbearance from dominant carrier tariff regulation for its sale of "mass market" DSL services to end users and from the Section 251(c)(4) and Section 271 requirements, 47 U.S.C. §§251(c)(4), 271(c)(2)(B)(xiv), that it offer such services for resale to CLECs at an avoided cost discount. Qwest has not made even the most minimal showing that would entitle it to relief from dominant carrier tariff regulation in the provision of retail "mass market" DSL service, nor has it shown that relieving it of the obligation to offer DSL service for resale at an avoided cost discount will promote competitive market conditions and enhance competition. For these reasons, the Commission must deny Qwest's Petition.

I. Qwest Has Not Properly Defined The Relevant Product and Geographic Markets

Although Qwest states in its Petition that it is requesting forbearance from dominant carrier regulation for its DSL service,[1] it also states that "[f]orbearance does not

[1] Specifically, Qwest seeks relief from the tariff requirements set forth in Section 204 of the Communications Act, 47 U.S.C. §204, and part 65 and Sections 61.38-61.49 and 61.58–61.59 of the Commission's rules, 47 C.F. R. Part 65 and §§61.38-61.49, 61.58 and 61.59. Petition at 13.

speak to the issue of whether ILECs providing xDSL service should be regulated as dominant carriers." (Petition at 8, 13) It is unclear from Qwest's contradictory assertions whether it believes it is entitled to relief from dominant carrier tariff regulation prematurely and before the Commission decides the broader issues in the pending *ILEC Broadband Rulemaking* proceeding,[2] or whether it believes it is not required to make a showing that it is non-dominant in the provision of DSL service in order to be relieved of the tariffing requirements. In either case, it is wrong.

In requesting forbearance at this time, Qwest is asking the Commission to prejudge the matters at issue in the *ILEC Broadband Rulemaking* where a full record already has been developed on whether Qwest should be reclassified as non-dominant in the provision of some or all of its broadband services. Rather than prematurely force a determination as to whether forbearance is warranted regardless of the outcome of the rulemaking, the Commission should dismiss Qwest's Petition without prejudice with an invitation to refile, if necessary, once the rulemaking is concluded and a decision issued. *See In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Memorandum Opinion and Order, FCC 02-340 at ¶31 (released December 31, 2002) (rejecting SBC's request for a declaratory ruling that it is non-dominant in the provision of broadband services pending resolution of the non-dominance issues in the *ILEC Broadband Rulemaking* proceeding).

Section 61.3(q) of the Commission's rules, 47 C.F.R. §61.3(q) defines a dominant carrier as a carrier found by the Commission to have market power (i.e., power to control

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[2] *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket 01-337, Notice of Proposed Rulemaking, 01-360 at ¶42 (released December 20, 2001) ("*ILEC Broadband Rulemaking*").

prices). The Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for the services at issue, (2) identifying firms that are current or potential suppliers in that market, and (3) determining whether the carrier under evaluation possesses individual market power in that market. Central to this inquiry is reliable market data concerning competitive market conditions for the service or services at issue. *Petitions of US West Communications, Inc. For Forbearance From Regulation As A Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket 98-157, Memorandum Opinion and Order, FCC99-365 at ¶20 (released November 22, 1999), remanded on other grounds *sub nom. AT&T v. Federal Communications Commission,* 236 F.3d 729 (D.C. Cir. 2001).

The Commission defines product markets with reference to demand cross elasticities or consumer substitutability of demand for competing products. *ILEC Broadband Rulemaking* proceeding at ¶18. Qwest does not specifically define a relevant product market, but instead seeks non-dominant carrier treatment for "mass market" DSL services sold to end users.[3] Qwest defines the "mass market" as "service of a type that is normally associated with residential and small business end users. Like the FCC, Qwest defines the market in terms of the products a particular customer buys, rather than the kind of entity purchasing the service." (Petition at 3, n. 12) The problem with this definition is that it encompasses every potential purchaser of DSL service, including every business customer and every residential customer. Although Qwest contends that mass market broadband services are characterized by "'robust intermodal competition from cable providers'" (Petition at 15), it has made no showing that cable modem service

[3] Qwest is not seeking tariff relief for its DSL Host Service, a product sold to ISPs. (Petition at 3, n. 13).

is in fact widely available to business customers in its 14 state region and is therefore a substitutable product for the DSL service it provides to business customers.

In contrast to Qwest's apparent assumption that business customers throughout its 14 state service territory have access to cable modem service, the Commission has found that in providing cable modem service, cable companies have remained focused on largely residential service consistent with their historic residential network footprints. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order On Remand And Further Notice of Proposed Rulemaking, FCC 03-36 (released August 21, 2003) at ¶51. Qwest did not update the record with evidence indicating that the Commission's finding is no longer true. In the absence of a showing that business customers have a choice of DSL and cable modem service, Qwest's request for forbearance from dominant tariff requirements for DSL services sold to business customers must be denied.

Qwest also failed to specifically identify a relevant geographic market for its DSL service and instead seeks forbearance throughout its 14 state territory. The Commission has previously held that the relevant geographic market for residential high-speed Internet access services is local. Because consumers' choices are limited to those companies that offer high-speed Internet access services in their area, the only way to obtain different choices is to move. *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee,* CS Docket No. 00-30, Memorandum Opinion and Order, FCC 01-12 at ¶ 74 (released January 22, 2001). Qwest itself concedes that alternatives to its DSL service are not ubiquitously available throughout its 14 state area when it complains that rate averaging requires it "to charge the same rate in both the high-cost and low-cost areas within the same state *without regard to whether Qwest confronts intermodal and intramodal competitors*." (Petition at 5, emphasis added). Rather than limit its request for forbearance to those local service areas where it can show that there are competitive alternatives for its DSL services, Qwest seeks relief in its entire 14 state service territory. Qwest's reliance on national and statewide statistics to claim that cable subscribership exceeds that of DSL (Petition at 8-10) does not constitute the type of "reliable market data" concerning competitive market conditions for DSL service in each of its local service areas that the Commission needs to perform the requisite dominance/nondominance analysis.

Qwest's failure to properly identify the relevant product and geographic markets, much less prove that it lacks market power therein, is fatal to its Petition. The Commission cannot possibly determine that Qwest is entitled to forbearance from the dominant carrier tariff regulation in its entire 14 state region without regard to whether it confronts intermodal or intramodal competition in each and every one of its local markets.

II. Qwest Has Failed To Meet The Statutory Requirements For Forbearance From Dominant Carrier Tariff Regulation

As a result of its deficient showing on the product and geographic market criteria, Qwest has not met its heavy burden of proving that it meets the requirements to obtain forbearance from the dominant carrier tariff regulations and Section 204 of the Communications Act. Section 10(a) of the Act, 47 U.S.C. §160, provides that, prior to granting a telecommunications carrier forbearance from any provision of the Act or Commission regulation, the Commission must determine that (1) enforcement of the provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision is consistent with the public interest. Section 10(b) requires the Commission to consider whether forbearance from enforcing such provision will promote competitive market conditions and enhance competition in making the public interest determination. All three conjunctive prongs of Section 10(a) must be satisfied before the Commission is obligated to forbear from enforcing a regulation or statutory provision. The Commission must deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied. *Cellular Telecommunications & Internet Association v. Federal Communications Commission*, 330 F.3d 502 at 509 (D.C. Cir. 2003).

While Qwest has identified cable, wireless, satellite[4] and BPL as current or potential substitutes for its DSL service (Petition at 15), it has not shown that any or all of these alternatives are available to all customers in each of its local service areas or that they are capable of restraining its ability to charge unjust and unreasonable or unreasonably discriminatory rates. Instead, it asks the Commission to assume that these alternatives are ubiquitously available to all residential and business customers in its 14 state service area, an assumption the Commission should not make.

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[4] The Commission has determined that satellite broadband service exists and is most attractive where DSL or cable modem service is *not available* and that it is generally not price competitive with wireline DSL service. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order On Remand And Further Notice of Proposed Rulemaking, FCC 03-36 (released August 21, 2003) at ¶ 54. Thus, the Commission should reject Qwest's attempts to characterize satellite broadband service as a substitute for its DSL service.

In support of its contention that it lacks the market power to charge unreasonable or discriminatory rates, Qwest cites to (1) a report on a nationwide study of customers having access to both cable modem and DSL service that purportedly shows that for every one percent increase in the price of DSL, the demand for cable modem service rises by 0.591 percent and (2) a report on a non-geographically specific survey showing that some percentage of broadband users would be willing to switch between cable modem service and DSL for a discount on their monthly bill. (Petition at 16-17) Demand elasticity is clearly relevant to a market power determination, but the studies to which Qwest cites are not relevant to a determination of Qwest's market power. Qwest has made no showing that "mass market" customers throughout its 14-state service area have access to both cable modem and DSL service and would be able to switch between products when facing a cost increase. As a result, Qwest cannot rely on the studies to show that its customers would turn to other providers in each of its local markets in all 14 states if it attempted to charge unjust or unreasonably discriminatory rates.

Qwest also relies on the results of a survey of its own customers who cancelled their DSL service due to "cost or the fact that they received a better competitive offer." (Petition at 17) Again, these survey results may demonstrate that price is a factor in customer choice of high-speed Internet access service providers, but they do not show that all of Qwest's customers in all 14 states have access to a choice of providers. In light of the fact that Qwest seeks forbearance from dominant carrier regulation in all local markets in all 14 states, it cannot rely on such selective data to prove that dominant carrier tariff requirements are not necessary throughout its service area to ensure that its DSL charges are just and reasonable and not unjustly discriminatory.

Qwest's assertion that dominant carrier tariff regulation is not necessary to protect consumers because consumers have the option of turning to other providers (Petition at 18) is similarly flawed. Because Qwest has not shown that all consumers throughout its 14 state service area have a choice of providers, it has failed to show that dominant carrier tariff regulation is not necessary to protect consumers.

There is no merit whatsoever to Qwest's contention that elimination of the rate averaging requirement would protect consumers by allowing it to confront its cable modem competitors in urban areas with vigorous price competition while charging higher prices to rural customers (Petition at 5, 21-22). The Commission has previously determined that such strategic pricing in the absence of competition (which Qwest has not demonstrated exists in each of its local service areas) is harmful to consumers:

> Without dominant carrier regulation and in the absence of competition, the BOC petitioners could discriminate against certain customers by charging higher rates to those that lack competitive alternatives. For example, without our rate structure and rate level regulations BOC petitioners could engage in strategic pricing by offering reductions in rates for special access and high capacity dedicated transport services where they face competition and higher rates for these services where they face little competition. This sort of strategic pricing discriminates among consumers not on the basis of cost characteristics but on the basis of availability of competitive alternatives. Moreover it deters entry by competitors.

Petitions of US West Communications, Inc. For Forbearance From Regulation As A Dominant Carrier in the Phoenix, Arizona MSA, CC Docket 98-157, Memorandum Opinion and Order, FCC99-365 at ¶34 (released November 22, 1999), remanded on other grounds *sub nom. AT&T v. Federal Communications Commission*, 236 F.3d 729 (D.C. Cir. 2001). The Commission should make the same determination here.

Finally, the Commission must reject Qwest's arguments that forbearance from dominant tariff regulation would serve the public interest by promoting competitive market conditions and enhancing competition. Qwest's assertion that the 15 day notice requirement for price increases set forth in Section 204 of the Act and Section 61.58 of the Commission's rules eliminates the possibility of surprising competitors with a price increase (Petition at 18) may be true, but it does not demonstrate that forbearance will enhance competition or support Qwest's contention that competition will constrain its ability to charge unreasonable or discriminatory prices. (Petition at 12) Qwest's focus on rate increases is also inconsistent with its representation that "[d]ecreased regulation could incent Qwest to *lower* xDSL prices or accelerate xDSL deployment plans." (Petition at 7, emphasis added)

Granting Qwest forbearance from the rate increase advance notice requirement so that it can surprise competitors with rate increases will deprive consumers of the ability to challenge those rate increases before they go into effect. In order to meet the public interest forbearance criterion, "a petitioner must explain how the benefits of a statutory provision can be attained in the event of forbearance." *In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, CC Docket No. 98-65, Memorandum Opinion and Order, FCC 99-215 at ¶ 7 (released August 31, 1999). Other than suggesting that consumers can turn to other providers in the event that it charges unreasonable rates, Qwest made no effort to address how the benefits of the tariff requirements can be attained in the event of forbearance. Qwest, however, did not even show that competitive alternatives are available to all consumers in each of its local markets in each of its 14 states.

Qwest's plea that forbearance from rate averaging would enhance competition by allowing Qwest to move its DSL rates closer to actual costs rather than requiring it to offer the same DSL rate in low-cost densely populated urban areas as in high cost sparsely populated rural areas (Petition at 21-23) is particularly weak. Qwest's DSL service uses the same copper loop facilities used to provide voice service. In the *CALLS* order, the Commission stated that it was unaware of any ILEC, including Qwest, allocating any costs to ADSL service. *In the Matter of Access Charge Reform*, CC Docket 96-262, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket 99-249, Eleventh Report and Order in CC Docket 96-45, FCC 00-193 at ¶ 98 (released May 31, 2000) To the extent that Qwest fully recovers its loop costs in the rates it charges for voice service, any price differential for DSL service in urban and rural or high-cost and low-cost areas would reflect not a difference in cost characteristics, but the existence or non-existence of competitive alternatives to Qwest's DSL service. Deaveraging would allow Qwest to lower prices where there is competition from cable and raise prices to unreasonable levels where customers do not have a choice. Allowing Qwest to price discriminate against customers who do not have a choice of broadband providers clearly would not serve the public interest.

Qwest cannot credibly claim that dominant carrier tariff regulation is stalling its DSL deployment plans. In a December 13, 2004 press release, Qwest boasted that:

> As direct result of strategic DSL investments and initiatives, Qwest Communications International Inc. announced today that it has achieved one million DSL subscribers. This represents an important milestone for the company and highlights the fact that Qwest's four consecutive quarters of *double digit subscriber growth is outpacing the current industry average*.
>
> "Customers are rewarding our energy and focus on DSL," said Dan Yost, Qwest executive vice president of product and marketing. "We understand how

> important high-speed internet access is to customers and we will continue to expand our broadband offerings in 2005, while leveraging the DSL infrastructure we currently have in place."
>
> To expand its DLS footprint and reach more customers, *Qwest will install 4,000 remote terminal locations by the end of 2004.* As a result, the company can now offer high-speed Internet access to nearly 10 million homes (65 percent of Qwest households) within its 14-state local service area.[5]

Elimination of dominant carrier tariff regulation is clearly not necessary to promote broadband deployment in Qwest's 14 state local service area.

III. Qwest Has Failed To Meet The Statutory Requirements For Forbearance From Section 251(c) (4) and Section 271

It is not enough that Qwest seeks freedom from the tariff regulations that guard against unreasonable and discriminatory pricing to its end users. It also wants to be freed of the obligation to provide DSL service to CLEC competitors at the avoided cost discount mandated by Sections 251(c)(4) and 271 of the Act. (Petition at 23-26) The Commission has already relieved Qwest of the obligation to make the high-frequency portion of copper loops used to provision DSL service available to CLECs on an unbundled basis at cost-based rates. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order On Remand And Further Notice of Proposed Rulemaking, FCC 03-36 (released August 21, 2003) at ¶ 248. Relieving Qwest of its resale obligations could eliminate intramodal competition in the provision of mass-market DSL service altogether.

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[5] "Qwest Achieves One Million DSL Subscriber Milestone" http://biz.yahoo.com/bw/041213/135746_1.html (emphasis added).

Qwest asserts that it "wants the freedom to negotiate commercial agreements with its carrier customers" and that the "price terms in the resulting agreements may or may not reflect an avoided cost discount." (Petition at 23) Qwest does not need forbearance from the resale requirements of Sections 251(c) and 271 to negotiate commercial agreements with CLECs. That freedom is implicit in Section 252(a) of the Act. Section 252(a) provides that an ILEC may negotiate a voluntary agreement with a requesting carrier without regard to the standards set forth in Section 251(c)(4), including the avoided cost discount. Sections 251(c)(4) and 271 provide a critical default pricing option, however, in the event that CLECs are unable to reach voluntary agreements with Qwest.

In seeking resale relief, Qwest describes nothing about the competitive conditions in its own local markets in its 14 state region, but asks the Commission to consider "the BOCs' relative position" in the emerging broadband market and states that the "BOCs relative position would not lead to unreasonable or discriminatory practices in the absence of a Section 251 or 271 obligation to resell." (Petition at 24-25) The BOCs' relative position in the ADSL market is an 83.5% market share nationwide and ILECs as a whole control 95% of the ADSL lines in service as of June 2004.[6] Such a controlling market share demonstrates that the "BOCs", including Qwest, maintain the ability to engage in unreasonable or discriminatory practices to drive their intramodal reseller competitors from the market in the absence of the statutory resale obligation. Qwest's argument that the resale requirement is not necessary to protect consumers because consumers can purchase service from an intermodal competitor that is not reselling its

[6] *High-Speed Services for Internet Access: Status as of June 30, 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau at 3 and Table 5 (December 2004).

service (Petition at 26) is entitled to no weight. As noted above, Qwest has not shown that consumers in all of its local markets in all 14 states have intermodal options.

Qwest's reliance on the D.C. Circuit's observation that "even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs" (Petition at 25) does not help its case. The Commission has previously stated its intention to "fight any attempt to make residential broadband [a monopoly or duopoly] because it would not perform well for consumers." [7]

Relieving Qwest of its resale obligations will not enhance competition or promote competitive market conditions. It is safe to assume that Qwest is not seeking forbearance from its statutory resale obligations in order to increase the avoided cost discount and thereby lower rates to resellers because it does not need forbearance to do so. It is well established that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is likely to lead to an increase in prices for wholesale inputs that competitors need to serve their customers. *See In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers,* CC Docket 98-137, Report and Order in CC Docket No. 98-137, Memorandum Opinion and Order in ASD 98-91, FCC 99-397 at ¶63 (released December 30, 1999).

The Commission has interpreted Section 251(c)(4) in such a way as to create "affordable resale opportunities in order to stimulate the development of local

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[7] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, ¶ 52 (1999).

competition." *Deployment of Wireline Services Offering Advanced Services*, CC Docket 98-147, Second Report and Order, FCC 99-330 at ¶ 11 (released November 9, 1999). Qwest complains that because its intermodal competitors are not subject to the same statutory resale obligations, the resale provisions of Sections 251 and 271 have outlived their usefulness as they pertain to DSL. (Petition at 23-24) Contrary to Qwest's assertions, the lack of competition in the intramodal DSL market and the fact that ILECs retain a 95% market share demonstrate that the resale provisions have not lost their usefulness. The Commission must reject Qwest's pleas and conclude that enforcement of the avoided cost resale option remains necessary to stimulate the development of local competition.

CONCLUSION

For the foregoing reasons, CompTel/ASCENT respectfully requests that the Commission deny or dismiss Qwest's Petition For Forbearance.

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